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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—

R. FISKE WHITNEY,
Petitioner,

v.

THE NEW YORK STOCK EXCHANGE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petitioner, R. Fiske Whitney, *Pro Se,* the plaintiff below, respectfully prays that a *writ of certiorari* issue to review the decision rendered by the United States Court of Appeals for the Second Circuit on March 14, 1974, which unanimously affirmed a judgment of the United States District Court for the Southern District of New York insofar as it granted summary judgment dismissing the complaint against the defendant New York Stock Exchange.

Opinions Below.

No opinion was delivered in the Court of Appeals. The opinion of the District Court is not reported, but is set forth as Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals was dated and entered March 14, 1974.

The jurisdiction of this court to review the judgment of the Court of Appeals is conferred by 28 U. S. C. §1254(1).

Questions Presented.

In *Silver v. New York Stock Exchange*, 373 U. S. 341, 360, this court emphasized that "the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations *and those of their members honest and viable.*" (Italics added.)

In this case, where petitioner claims that he sustained substantial damages because of such anticompetitive acts of the respondent, the following broad public interest question, "1.," is presented, together with specific questions "2.," "3." and "4."

1. Should this nation's financial exchanges be permitted the widespread use against the public of the circuitous defense against antitrust grievances of: (a) compelling in advance that all customers enter into arbitration with a member firm, and then (b) setting up the resulting arbitration award as a defense to an action against the exchange based on alleged violations of the antitrust laws?

2. Did the District Court below err in limiting its considerations, as stated in its memorandum and order (101a) to the customer-broker part of the relations

between petitioner and duPoint, and to the "inquiry" without "effective action" performance of the respondent, and in not considering the contributing acts of the respondent past and concurrent, as creating a combination in restraint of trade which was the direct cause of petitioner's being driven out of the option-authoring business with substantial capital losses?

3. Should petitioner not have been afforded an opportunity for receipt of an answer and for discovery with respect to the respondent's failure to give relief by a hearing and action when respondent had notice of the malfeasance, of petitioner's continually mounting damages, and of petitioner's imminent elimination as a competitor in the business of option authoring?

4. Did not petitioner in his complaint set forth a sufficient case against respondent on antitrust grounds so that it was error to: (a) summarily dismiss petitioner's complaint, or (b) at the very least, not afford petitioner the opportunity to clarify his complaint?

Statement.

Petitioner brought this action against respondent, and Francis I. duPont & Co. (duPont), on antitrust and other grounds, for damages sustained by petitioner at the immediate hands of duPont but in fact caused by acts and omissions of the respondent. "The Exchange did not refuse to do business with plaintiff; the Exchange does not do any such business.[1]

[1]Brief of defendant-appellee, bottom of p. 6.

There is no dispute about this. But the respondent *is* the association of member firms. The respondent maintains, directs and controls the stock-trading floor, all essential operations and all acts of its member firms by means of rules, directives, supervision and inspections. The respondent, as required by its constitution, enforces its policies and control of the member firms by powers of suspension of membership, and expulsion.

In 1960 and 1961, petitioner had conducted option-authoring businesses through the facilities of various member firms, including Goodbody & Co. (45a).

Petitioner's brokerage account at duPont, for the opening of which he had been required to sign a "Customer's Agreement" containing a compulsory arbitration clause (54a), had been conducted acceptably by duPont for several months when, in August 1962, petitioner negotiated with duPont relative to option-authoring through their facilities. Initially, options concerning delivering, at about $99 a share, 500 shares of Polaroid at any time during the ensuing year, and accepting for purchase at the same price 300 shares of Polaroid, were negotiated; and, as per the rules of the respondent, duPont endorsed these options.

When, in the regular course of protecting his short position, upon strength appearing in Polaroid's tape action, petitioner sought to cover his short position by buying Polaroid stock, duPont frustrated this hedging by, on August 16, 1962, demanding cash margin of $15,211 or sellout of the Polaroid. Petitioner argued to duPont margin officials that the margin call was wrong; that no margin should be required. Months later, duPont admitted in writing for the first time (31a) that the margin

demand should have been $8,760. Petitioner showed (83a) that no margin call at all should have been made.

No timely acknowledgment of error was admitted by duPont and the Polaroid stock bought as a hedge was forcesold. The price of Polaroid rose $38 a share, far past the point where option authors were permitted by the operation of the rules of the Federal Reserve Board, and of the respondent, to liquidate their short call positions not only without putting up additional margin, but even with the actual release of margin (84a, 85a). Polaroid stock to hedge was bought again. Even under these circumstances duPont and respondent forced liquidation of the hedge and also they admitted months later that the $11,691 margain demand should have been $5,743; petitioner showed (83a) that there should have been no margin call at all. During all this period and for the rest of the year that the options continued in effect, duPont made numerous other damaging errors in handling petitioner's business, and duPoint persisted in withholding from your petitioner the escape of liquidating his short call positions by purchase of Polaroid stock (48a).

To promote hedging of run-away short call positions, the Exchange margin rules provided that short call margin should increase $1.30 for each $1 of advance of each share of stock under short call (on 500 shares, that frequently amounted to several thousand dollars a day). This had the effect of accumulating, on the short calls, large maintenance margin balances, use of which facilitated liquidation of short call positions by purchase of stock. But petitioner was not permitted to use these large accumulated maintenance margin balances and thus liquidate his short call positions (25a, 26a, 34a, 48a).

During the year when the options were effective against petitioner, Polaroid rose over $70 a share. The margin required to maintain these unhedged short call positions necessitated the liquidation of petitioner's investment portfolio of stocks and bonds which was the backbone of his business. This generated windfall commissions not only for duPont but also for the respondent's floor facilities while conserving for duPont and the respondent the inevitable commissions expected when the options were exercised.

Petitioner took no funds from the capital of the business for management or for expenses of operation. The capital in the business diminished from a net equity of $95,230.17 to a net equity of $2,033.43 (80a).

If the petitioner's business had not been wrongly harassed by the Exchange, the final equity would have been $155,200 instead of $2,033.43 (91a).

Petitioner made scores of timely oral and eleven (11) written complaints and demands for relief and for a hearing to respondent (62a, 63a). Petitioner was never granted any relief or a hearing. The exchange of letters clerically induced by respondent between petitioner and duPont, was no hearing (30a, 43a).

Petitioner sought to transfer his account (81a, 82a) to another member firm but was prevented from doing so by rules and directives of the respondent which prohibited transfer of any account which was under margin call. The deprivation of the liquidation privilege and other wrong acts of duPont, and of the respondent, rendered petitioner unable to rid his account of margin calls; on information and belief, the respondent and its member firms conspired in other ways to prevent transfer out of

duPont of petitioner's account. Petitioner has had no discovery and has not even received an answer to his verified complaint.

While petitioner's damages were sustained at the immediate hands of duPont, it is obvious that the respondent was the actual cause of petitioner's damages; quoting from page 18 of brief for defendant-appellee (respondent):

> "The scope of the Exchange's duties to supervise its member firms is set forth in section 6 of the Exchange Act (15 U. S. C. §78f) and the case law thereunder. Under section 6 an exchange which seeks registration is required to file an agreement 'to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title [the Exchange Act], and any amendment thereto and rule or regulation made or to be made thereunder.' Section 6(b) further requires the Exchange to adopt rules 'for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade' and section 6(d) requires the Commission to grant registration to the Exchange if it appears to the Commission that 'the rules of the Exchange are just and adequate to insure fair dealing and to protect investors.'"

Petitioner had had no trouble authoring 40 times as many options through the facilities of Goodbody & Co. The rules and directives of the respondent prevented relief by transfer to another member firm and also prevented relief by transfer of the option endorsement to an outside bank or insurance company. It was a misconstrual of a combination of respondent's, and the Federal Reserve Board's rules and directives which duPont alleged as their reasons for their acts. It was unfair that petitioner should be deprived of the margin facilities cus-

tomary in the industry (82a), of the hedging facilities and the liquidation privileges prescribed and set forth in the rules of the Federal Reserve Board, and of the respondent (85a), advantages which petitioner's competitors, both members and nonmembers of the respondent, were at that same time enjoying.

Petitioner, a lone businessman, was confronted with a group boycott caused by the actions and omissions and by the rules and directives of the respondent in violation of its Charter, the antitrust laws and the precepts of the *Silver v. New York Stock Exchange* decision, all of which required both the member firm and the respondent to maintain fair and equitable dealing, give hearings and avoid group boycotts, especially where no regulatory or other advantage could be derived from such group boycott.

Upon the repeated notices at intervals, the respondent should have given petitioner relief either at duPont or by implementing transfer of the account out of duPont. As soon as petitioner saw how duPont was mishandling his business, petitioner would have transferred his account to another firm, or to a bank, or to an insurance company but for the acts of the respondent. This could have been achieved at a time before substantial damages had been caused. It was the respondent's detention of petitioner's business, locked in unfair competitive conditions, which generated the destruction of petitioner's business, and the damages.

Reasons for Granting the Writ.

1. The financial exchanges should not be permitted to monopolistically impose a one-sided contract between member firms and the public, calling for binding arbitration of all issues (54a) arising out of that contract, and to thereafter by collateral estoppel utilize the resulting arbitration as a defense against charges of their own antitrust malfeasance.

A study of all of the 67 reported cases which Sheppards says cited the *Silver* decision, of numerous reported cases in the lower courts, and informal appraisement of the thrust of scores of unreported cases, discloses that there is a regular procedure, in matters where it is really the exchange which is at fault and liable, for the method of defense, generally successful, against complaints of wrong acts, to be to quarantine the litigation at the member firm level and to direct it into arbitration. This is in conformity with the exchanges' avowed intention of reducing exposure in the courts of their "dirty linen."

The arbitrators, in the instant case, where immediate damages were proven at either $93,000 or $153,000 depending on measure of damages applied (80a, 81a) awarded petitioner $12,364.68. The respondent's Vice President, Mr. Bishop, in his affidavit (20a), and also respondent's counsel in his brief for defendant-appellee at page 7, both point out that the arbitrators' award appears to represent the aggregate dollar amount of error admitted in writing by duPont in two (2) of twenty-three (23) wrong margin calls.

It is not the amount of precise error in a margin call but rather the effect and the results which determine the damages. If a druggist compounds a substance into a

prescription and the patient is killed thereby, the difference in value between the wrong substance put into the prescription and the right substance which should have been put into the prescription, is hardly the true measure of damages. In the instant case, the arbitrators apparently erred as to their measure of damages, application of that measure of damages, and reasonableness of the award.

Following the regular procedure of the exchanges, the respondent thereafter moved for dismissal of the entire case against itself on grounds of collateral estoppel. The case against the respondent involved antitrust violations, treble damages and complaints not asserted in the arbitration against duPont, and not able to have been asserted in that arbitration. The exchanges, in a large number of suits similar to the instant case, have been permitted to escape answering and all discovery, and are permitted to get dismissal of clarifying antitrust suits against them by the circuitous defense of collateral estoppel based on their former wrong act in forcing on the public the one-sided Customer's Agreement with the binding arbitration clause. Using *Silver's* words, *supra*, as to the function of antitrust laws the " * * * peculiarly appropriate * * * check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable * * *" is nullified, and the interests of justice are defeated. It is a case of the wrongdoer relying on his wrong acts as a defense against other wrongdoing.

2. The instant area of alleged malfeasance by the Exchange is one in which relief can be gotten by the public *only* through antitrust litigation (and this relief should not be nipped in the bud on a widespread basis before there is an answer, chance for amendment of the complaint, and advantage of discovery).

As noted in *Silver,* page 357; the Securities Exchange Act "* * * does not give the [Securities and Exchange] Commission jurisdiction to review particular instances of enforcement of exchange rules." The *Silver* decision points out that there is no other avenue of relief for the aggrieved in this field.

3. In these days when the public's distrust of financial exchanges is starving the economy, by retarding the proper flow to industry of investment funds, it is of prime national import that all possible causes of that distrust be dissipated.

As noted in *Silver,* page 366; "* * * It requires but little appreciation of the extent of the Exchange's economic power and of what happened in this country during the 1920's and 1930's to realize how essential it is that the *highest ethical standards prevail as to every aspect of the Exchange's activities.* What is basically at issue here is whether the type of partnership between government and private enterprise that marks the design of the Securities Exchange Act of 1934 can operate effectively to insure the maintenance of such standards in the long run." (Italics added.)

CONCLUSION.

For the reasons given above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 14, 1974.

Dated: New York, New York,
June 6, 1974.

Respectfully submitted,

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APPENDIX A.

Memorandum and Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiff was a customer of Francis I. duPont Co., a member of the New York Stock Exchange. He sued both duPont and the Exchange for losses alleged to have occurred through duPont's malfeasance. His action against duPont was on December 6, 1967 stayed by Judge Mansfield pending arbitration. That arbitration has since been had resulting in an award to plaintiff of $12,364.68. duPont tendered the sum awarded on condition that the action as against it can be discontinued. The plaintiff refused that tender but insisted that duPont enter in a certain stipulation for the purpose of protecting plaintiff's rights against the New York Stock Exchange. Three motions are now before the Court:

1. Motion by defendant duPont to confirm the award and dismiss the complaint against it;
2. Motion by plaintiff to compel defendant duPont to enter into the proffered stipulation to protect plaintiff's rights against the Exchange, and
3. Motion by the Exchange to dismiss the action as against it.

The two first motions require no discussion. Defendant duPont is plainly entitled to have the award confirmed and the action as against it dismissed. The motion to that effect is accordingly granted. It necessarily follows that the plaintiff's contrary motion is denied.

The Stock Exchange's motion proceeds primarily upon the basis that all the elements of damage asserted against it were included in the material submitted to the arbitrators on plaintiff's claim against duPont. The Exchange argues that it is entitled to a dismissal of the action against it on the basis of collateral estoppel by judgment. On oral argument plaintiff—without conceding the validity of the Exchange's position as a matter of law—admitted that all elements of damage were included in the material submitted to the arbitrators except plaintiff's right to triple damages and counsel fees under the antitrust laws. The question then is whether the complaint alleges an antitrust cause of action against the Exchange. Plaintiff, admitting he has no authority to support his position, contends that it does because of the Exchange's alleged failure to take effective policing action against duPont after plaintiff had advised the Exchange of duPont's alleged iniquities. What the Exchange did do upon such advice was to address letters of inquiry to the parties and advise them that it was without legal power to give plaintiff redress for any damages it may have suffered and to recommend to the plaintiff that he take appropriate legal action. Plaintiff is not clear as to exactly what else the Exchange should have done but is certain it should have done much more. I find no justification for a holding that the Exchange's alleged failure to take effective action against duPont constitutes an antitrust violation.

The complaint is accordingly dismissed.

So Ordered.

Dated: New York, New York
January 29, 1973

/s/ WHITMAN KNAPP,
U. S. D. J.